Local 1049, International Brotherhood of Electrical Workers, AFL–CIO *and* Asplundh Construction Corp. and Local 1298, Laborers International Union of North America, AFL–CIO. Case 29–CD–523

July 13, 2000

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

The charge in this Section 10(k) proceeding was filed on August 12, 1999, by Asplundh Construction Corp. (Asplundh or the Employer), alleging that the Respondent, Local 1049, International Brotherhood of Electrical Workers, AFL–CIO (the Electrical Workers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Local 1298, Laborers International Union of North America, AFL–CIO (the Laborers). The hearing was held on September 14, 1999, before Hearing Officer Stephanie LaTour.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a New York corporation, with its principal place of business in Yaphank, New York, is a contractor engaged in the installation and repair of electric utility and natural gaslines, and also performs general construction, including road construction work. During the 12 months preceding the hearing, Asplundh purchased and received at its Yaphank facility goods and materials valued in excess of $50,000, from points located outside the State of New York. The parties stipulate, and we find, that Asplundh is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Electrical Workers and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Asplundh's principal customer in its gas and electric line service operations is Keyspan Energy (Keyspan), formerly known as Long Island Lighting Company (LILCO). In servicing Keyspan's gaslines in Nassau, Suffolk, and Queens Counties, Asplundh extends main gaslines, ties in residential service to main line extensions, repairs leaks in gas mains and residential service lines, and lays underground electric cable in a common trench with gas mains and services.

Asplundh has collective-bargaining relationships with both the Electrical Workers and the Laborers. Pursuant to one of two collective-bargaining agreements between Asplundh and the Electrical Workers, employees represented by the Electrical Workers perform gas utility work for Asplundh involving gaslines 2 inches or less in diameter.[1] Pursuant to a collective-bargaining agreement between Asplundh and the Laborers, employees represented by the Laborers perform gasline work as well, although the size of the gaslines on which they work is not specified in the agreement.

Before the current dispute, employees represented by the Electrical Workers, with some exceptions, have been assigned gas work involving lines 2 inches or less in diameter, and employees represented by the Laborers have been assigned gas work involving gaslines over 2 inches in diameter. The Electrical Workers' agreement expired in February 1999, and the Laborers' agreement expired in May 1999. In the bargaining for renewal contracts, both Unions insisted that the Employer agree to assign small diameter work to employees they respectively represented.

In early July 1999, Laborers President Stephen Buckley informed Francis Giordano, Asplundh's vice president, that the Laborers wanted all of the Employer's new 2-inch gasline work. In late July 1999, the Employer won a bid to perform gas work at the Bohemia, New York project. Asplundh decided to assign work involving gaslines 2 inches or less in diameter to employees represented by the Electrical Workers, and to assign larger diameter work to employees represented by the Laborers. On August 5, 1999, after learning of the Bohemia job, Everett Lewis, the Electrical Workers' business representative, met with Francis Giordano, Asplundh's vice president, and told him that the Employer would have "problems" if the small diameter gas work was not assigned to employees represented by the Electrical Workers. When Giordano asked Lewis about the nature of such "problems," Lewis responded that the Electrical Workers would "shut you down." Lewis repeated the same threats the next day by telephone.

B. The Work in Dispute

The disputed work is the work being performed by the employees of Asplundh Construction Company for Keyspan Energy[2] at a trailer park location in Bo-

[1] The parties refer to this agreement as the Gas Agreement. Asplundh and the Electrical Workers have entered into a second collective-bargaining agreement covering underground and overhead electrical work, which is not relevant to these proceedings.

[2] The notice of hearing states that the work is being performed for Long Island Lighting Company. At the hearing, the parties agreed that

hemia, New York, involving the installation of approximately 13,085 feet of 2-inch plastic gasline pipe.[3]

C. Contentions of the Parties

Asplundh contends that the Electrical Workers' threat to engage in a work stoppage is sufficient basis for the Board to have reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated, and neither Union disputes this contention. With regard to the merits, Asplundh and the Electrical Workers assert that the work in dispute should be awarded to employees represented by the Electrical Workers based on the jurisdictional provision of the Gas Agreement, employer preference, past practice of the parties, economy and efficiency of operations, and the superior training and skills of the employees represented by the Electrical Workers.

The Laborers contend that the work in dispute should be assigned to employees it represents based on its collective-bargaining agreement, the practice of other contractors in the area, and past practice. Finally, the Laborers dispute the Employer's assessment that the Electrical Workers would be more efficient in performing the work in dispute than would the Laborers.

D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, two jurisdictional prerequisites must be met. First, the Board must find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. Second, the Board must find that the parties have failed to agree on a method for voluntary adjustment of the dispute.

These jurisdictional prerequisites have been met in this case. First, as noted above, both the Electrical Workers and the Laborers claim the work in dispute. In addition, the Electrical Workers Representative Everett Lewis advised Asplundh that if the Employer assigned the disputed work to employees represented by the Laborers, employees represented by the Electrical Workers would "shut down" the Employer. On this basis, we find reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. *Operating Engineers Local 825 (Walters & Lambert)*, 309 NLRB 142, 143 (1992) (threat to "shut down" the job provides reasonable cause to believe the statute has been violated). Second, we find that that there is no method for voluntary adjustment of the dispute to which all parties are bound.[4] Accordingly, we find that the Board has jurisdiction to resolve this dispute.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

There is no record evidence that either Union involved in this dispute has been certified by the Board. Accordingly, this factor favors neither Union.

The Electrical Workers' Gas Agreement recognizes the Electrical Workers as the bargaining representative of employees servicing gas mains and extensions that are 2 inches or less in diameter, and this jurisdictional provision is identical to the jurisdictional provision of parties' prior collective-bargaining agreement. The Laborers' current agreement, which modified the parties' prior agreement, covers work on gaslines "of any size."[5] This language covers the work in dispute just as clearly as the provision in the Electrical Workers agreement.

Because both agreements at issue appear to cover the work in dispute, we conclude that an analysis of the parties' collective-bargaining agreements does not favor an award of the disputed work to either union.

Long Island Lighting Company is now known as Keyspan Energy. We are amending the description of work accordingly.

[3] The Employer and the Electrical Workers declined to stipulate to the description of the work in dispute. It is apparent, however, that their disagreement is with the scope of the award, which we address below, not the description of the disputed work. We find that, except as mentioned in the preceding footnote, the record supports the notice of hearing's description of the work in dispute.

[4] At the hearing, the Laborers moved to quash the notice of hearing, arguing that there was a voluntary method of adjustment to which all parties are bound. The hearing officer referred determination of this issue to the Board.

The Employer and the Electrical Workers have attached to their briefs an arbitrator's award issued subsequent to the instant 10(k) hearing. The arbitrator disagreed with the Laborers' contention that Asplundh was bound by the dispute resolution mechanism that the Laborers urged in the 10(k) hearing.

The Laborers makes no mention of the jurisdictional issue in its brief to the Board, which suggests that it has abandoned it in light of the arbitrator's ruling. Under the circumstances, we find that the record does not show that all parties have agreed on a method for voluntary adjustment of the dispute. We therefore deny the motion to quash the notice of hearing.

[5] Art. VII, § 2(w) of the Laborers' prior agreement referred to the "[i]nstallation of *all* gas mains and services and *all* work related thereto" without reference to the size of the gas lines themselves (emphasis added).

2. Employer preference

Giordano, Asplundh's vice president, testified that the Employer prefers to assign the work in dispute to employees represented by the Electrical Workers. The Laborers do not dispute the Employer's preference in this matter. Accordingly, we find that the factor of employer preference favors an award of the disputed work to employees represented by the Electrical Workers.

3. Employer past practice

Giordano testified that Asplundh's historical practice was to assign gas work involving lines 2 inches or less in diameter to employees represented by the Electrical Workers, and to assign gas work involving lines greater than 2 inches to employees represented by the Laborers. Giordano also testified that the occasional exceptions to this past practice occurred when employees represented by the Electrical Workers were not available to perform the work or when he needed to fill a small gap in the work assignments of employees represented by the Laborers. We conclude that the Employer's past practice has been to assign small gasline work to employees represented by the Electrical Workers, with deviations from this practice under circumstances not present in the instant case. Thus, we find that the factor of past practice favors an award of the disputed work to employees represented by the Electrical Workers.

4. Area and industry practice

The testimony regarding the practice of other contractors in assigning work similar to the work in dispute in the instant case is inconclusive. Therefore, we conclude that area and industry practice does not favor an award of the work in dispute to employees represented by either union.

5. Economy and efficiency of operations

Brett Martin, Asplundh's manager of gas operations, testified that employees represented by the Electrical Workers perform all the tasks associated with an assignment of the disputed work, including operating all the necessary equipment, cutting the road, excavating a trench by machine or by hand, fusing the gas pipe using heat and pressure, tapping the main and installing the service lines, backfilling the trench and patching the road, and driving the necessary trucks. According to Martin, the Employer would need only a five-person crew, consisting of a foreman, an underground mechanic, and three apprentices, if the disputed work at the Bohemia job is assigned to employees represented by the Electrical Workers. Each person on the crew would have minimal downtime because each crew member could perform all tasks associated with the disputed work.

By contrast, the Employer would need a six-person crew to perform the disputed work, if employees represented by the Laborers received the assignment. Employees represented by the Laborers do not operate any of the excavation machinery nor do they drive the necessary trucks. Those tasks would be assigned, respectively, to employees represented by local unions of Operating Engineers and Teamsters. Therefore, to assign the disputed Bohemia work to employees represented by the Laborers, the Employer would need a foreman, three laborers, one excavation machine operator, and one driver. Under this scenario, the excavation equipment operator and the driver would be left idle for several hours while the actual pipe installation was performed by the employees represented by the Laborers.

We conclude that an analysis of economy and efficiency of operations favors an award of the disputed work to employees represented by the Electrical Workers.

6. Relative skills and training

The record indicates that employees represented by both unions have the requisite skills and training to perform the work in dispute. Thus, this factor does not favor an award of the work in dispute to employees represented by either union.

Conclusions

After considering all the relevant factors, we conclude that Asplundh's employees represented by the Electrical Workers are entitled to perform the work in dispute. We reach this conclusion relying on Asplundh's preference, its past practice, and economy and efficiency of operations. In making this determination, we are awarding the disputed work to employees represented by the Electrical Workers, not to that union or to its members.

Scope of Award

The Employer and the Electrical Workers contend that the scope of the work in dispute should be broadened to include all gasline work performed by Asplundh employees in Nassau, Suffolk, and Queens Counties, New York, an area coextensive with the geographic jurisdiction of the Electrical Workers. The Board has customarily declined to grant an areawide award in cases where, as here, the charged party (the Electrical Workers) represents the employees to whom the work is awarded and to whom the Employer contemplates continuing to assign the work. *Sea-Land Service*, 322 NLRB 830, 835 (1997). Thus, we find a broad award inappropriate under the circumstances of this case. Accordingly, this determination is limited to the controversy that gave rise to this case.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Asplundh Construction Corp. represented by the Local 1049, International Brotherhood of Electrical Workers, AFL–CIO are entitled to perform the work being performed by Asplundh Construction Corp. for Keyspan Energy at a trailer park location in Bohemia, New York, involving the installation of approximately 13,085 feet of 2-inch plastic gasoline pipe.